

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA BROWN)	
Claimant)	
)	
VS.)	
)	
SWAN MANOR, INC.)	
ADVANTAGE EMPLOYMENT SERVICES)	
Respondents)	Docket No. 244,376
)	
AND)	
)	
KANSAS HEALTH CARE ASSN.)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carriers)	

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's Award dated July 11, 2000. The Board heard oral argument on March 21, 2001, by telephone conference.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondents and insurance carriers appeared by their attorney, James K. Blickhan of Kansas City, Missouri.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge determined that Brenda Brown sustained a work-related injury but concluded that she neither sustained temporary total nor permanent

partial disability as a result of the accident. The Administrative Law Judge awarded claimant the medical expenses incurred as a result of the injury.

The claimant on review contends the Administrative Law Judge erred in his denial of any permanent partial disability, temporary total disability compensation and all other issues. In her brief and at oral argument claimant contends that she not only sustained a permanent functional impairment but also sustained a work disability.

The respondent contends that claimant did not meet with accident arising out of her employment and did not give timely notice of the accident. Respondent agrees with the finding that there is no evidence claimant was ever temporarily totally disabled. Lastly, respondent notes that claimant has not established that she has any permanent impairment as a result of the work-related injury.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The Board determines that the Administrative Law Judge's findings and conclusions contained in his award are detailed, accurate and appropriate. The Board concludes there is no need to reiterate those findings and conclusions in this Order. Therefore, the Board adopts the Administrative Law Judge's findings and conclusions as its own except as hereinafter explained.

Initially, respondent contends that claimant did not meet her burden of proof to establish that she sustained a compensable work-related injury.

Claimant testified that she was employed for respondent as a certified medication aide on the night shift from 10 p.m. to 6 a.m. She had worked four consecutive evenings and as part of her job duties was required to mop the floors each night using an industrial size mop. She testified that over the four nights, as a result of the mopping, she experienced an onset of gradually worsening pain from between the shoulder blades up to just below her neck. The last night claimant worked she experienced a popping in her back at which point the pain became significant. Claimant testified that she called her supervisor the morning of October 18, 1998, and was advised to see a doctor of her choice.

Dr. Allen's contemporaneous medical record of October 20, 1998, confirms that at her initial examination claimant complained of low back pain with an onset which started after mopping a floor at work.

Respondent argues that claimant should not be believed because she initially claimed this incident occurred on the four days preceding and concluding on October 18, 1998. The respondent's time records revealed that claimant did not work on the four days preceding October 18, 1998. The claimant was deposed after the regular hearing and corrected the injury dates to the work period between October 9 and October 12, 1998. This time period more closely corresponds with the two-week time period noted in Dr. Allen's medical notes. The contemporaneous medical record supports claimant's assertion that she sustained injury while mopping at work. Claimant has met her burden of proof to establish that she sustained a work-related accident on October 12, 1998.

Respondent next contends that claimant failed to give timely notice of her alleged work-related accident. The evidentiary record contains contradictory evidence on this issue. Claimant testified that she hurt her back while working the night shift, advised a co-worker and the next day called the administrator of the nursing home to advise her of the incident. She was told to seek medical treatment and after she went to the doctor she filled out incident reports and left them on the administrator's desk. The administrator, Johnnye Lane, testified that she never received a call from claimant, never received an incident report and never was advised about any doctor's restrictions.

The Administrative Law Judge noted and the record confirms that there were numerous discrepancies in claimant's testimony. The Administrative Law Judge further noted that her credibility was slightly tarnished. However, the Administrative Law Judge found the claimant's testimony persuasive in light of the fact that a portion of claimant's personnel records had disappeared. Those records would have contained the incident report if it had been filed by the claimant. The Board adopts the finding that claimant gave timely notice.

The testimony of two doctors was proffered regarding the extent of permanent impairment, if any, the claimant sustained as a result of the her work-related injury. Dr. Clymer examined the claimant on respondent's behalf and opined the claimant had sustained a temporary upper back strain but according to the *AMA Guides* had no permanent partial impairment as a result of the injury and needed no physical restrictions.

The claimant's attorney referred her to Dr. Prostin for examination and rating. Dr. Prostin diagnosed claimant with a chronic strain or sprain of the thoracic spine and concluded claimant had a 7 percent permanent partial impairment according to the *AMA Guides*. Dr. Prostin imposed restrictions to avoid lifting more than 20 pounds occasionally or 5 pounds frequently and to avoid bending, twisting, pushing, or pulling, except for occasional frequent bending, twisting, pushing or pulling.

The Administrative Law Judge adopted Dr. Clymer's findings as more persuasive in light of the frequent inconsistencies in claimant's testimony and the surveillance video which demonstrated an ability to perform tasks that claimant had testified she was incapable of performing.

As previously mentioned, this record is replete with claimant's inconsistent as well as incorrect and false statements. Claimant testified at regular hearing that her work-related accident occurred on October 18, 1998, when she completed four consecutive evenings of work which required her to mop the floors each night. Subsequent records revealed that claimant did not work on October 15, 16, 17 or 18. Claimant was then deposed and changed her testimony to reflect that she was actually injured between October 9 and October 12, 1998.

At the regular hearing claimant testified that she did not work after seeing the doctor. But the records revealed that she continued to work until she quit on November 2, 1998.

At the regular hearing, claimant testified that the mopping at work resulted in pain from between her shoulder blades up to just below the neck. The contemporaneous office notes of Dr. Allen, on October 20, 1998, indicate claimant was initially complaining of mid to lower back pain and Dr. Allen diagnosed lumbar strain.

Claimant testified that she and her husband did not have an interest in any tavern or bar. The administrator, Johnnye Lane, testified that she knew claimant was helping run a tavern in September and October because she had read newspaper articles about the tavern. Surveillance video of claimant confirmed that fact and, as noted by the Administrative Law Judge, confirmed that the tavern was being operated by claimant and her husband. As the Administrative Law Judge noted, the surveillance tapes also showed claimant carrying weights in excess of the capability she claimed at the regular hearing.

When claimant was deposed on May 12, 2000, and changed her testimony regarding the date of her accident she also testified that she had not worked anywhere since the regular hearing was held on December 14, 1999. But as noted by the Administrative Law Judge, the surveillance tapes of claimant taken in February and March 2000 showed what appeared to be regular employment at the tavern operated by claimant and her husband. The investigator testified that on February 25, 2000, he entered the tavern and observed claimant tending bar and serving food. These activities, including preparing food for patrons of the tavern, were also observed in March.

Although each of these discrepancies taken individually might result in slightly tarnished credibility, the cumulative effect of these inconsistent, incorrect and false statements undermines claimant's credibility to the extent that her assertions regarding her symptoms which she provided the doctors cannot be believed. Accordingly, the Board adopts Dr. Clymer's opinion that claimant suffered a temporary injury which resolved without any permanent impairment.

Although the Administrative Law Judge determined claimant had no permanent impairment, he nevertheless awarded future medical upon application to and approval by the Director. Because Dr. Clymer concluded claimant suffered a temporary injury which had resolved, this portion of the Administrative Law Judge's Award should be reversed.

The Administrative Law Judge's Award also noted that the claimant's accident date was October 18, 1998, however, the claimant amended her testimony to reflect that the final event occurred on October 12, 1988. Accordingly, the finding of the date of accident is modified to reflect an accidental injury occurring on October 12, 1988.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 11, 2000, should be, and is hereby, reversed as to the award of future medical benefits and modified to reflect an accident date of October 12, 1998.

The Board approves and adopts all other orders entered by the Administrative Law Judge in his Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this _____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney, Pittsburg, Kansas
James K. Blickhan, Attorney, Kansas City, Missouri
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director